82-1032
NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET

Petitioner

versus

DIAMOND M DRILLING COMPANY

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

I. JACKSON BURSON, JR.
YOUNG & BURSON
P.O. Box 985
Eunice, Louisiana 70535 - 0985
(318) 457 - 9331

Counsel For Petitioner
Herman J. Doucet

QUESTIONS PRESENTED FOR REVIEW

(1) Did the United States Court of Appeals erroneously decide an important question of federal law which has not been, but should be settled by this Court, when it reversed a $540,000 jury verdict for the plaintiff in a negligence action brought under 33 U.S.C.A. §905(b) by applying the Court's own standard of review for jury verdicts in non-maritime cases arising under state statutes or state common law, instead of the standard of review for jury verdicts in cases arising under federal maritime statutes?

(2) Did the United States Court of Appeals decision violate the decisions of this Court setting forth the proper scope of appellate review of jury verdicts under the Seventh Amendment to the United States Constitution?

(3) Did the United States Court of Appeals require Herman Doucet to assume the risk of a hazard created by the vessel owner's employees in violation of this Court's declaration that assumption of risk is not a defense to a negligence suit brought under 33 U.S.C.A. §905(b)?

(4) Did the Court of Appeals continue to apply its own restrictive standard of shipowner negligence, fashioned before this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, instead of the broader standard of shipowner negligence promulgated by this Court in *Scindia*?

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

PAGE

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

PAGE

CASES:

TABLE OF AUTHORITIES (Continued)

PAGE

CASES:

TABLE OF AUTHORITIES (Continued)

PAGE

CASES:

CONSTITUTIONS:

TABLE OF AUTHORITIES (Continued)

PAGE

CONGRESSIONAL PROCEEDINGS:

STATUTES:

TREATISES:

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN J. DOUCET

Petitioner

versus

DIAMOND M DRILLING COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Herman Doucet, plaintiff in the captioned cause, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 23, 1982, (original decision) and on September 22, 1982, (per curiam denial of rehearing and of rehearing en banc).

CITATIONS TO OPINIONS BELOW

The judgment of the District Court on the jury verdict is unreported and is reproduced in the supplement at Appendix 4, Brief A-24. The court minutes showing the District Court's denial of defendant's motions for directed verdict, judgment n.o.v., and new trial are reproduced at Appendix 3, Brief page A-23. The opinion of the United States Court

of Appeals for the Fifth Circuit dated August 23, 1982, (Circuit Judges Coleman, Politz and Garwood), is reproduced in the supplement beginning at Appendix 2, Brief page A-3, and is reported in 683 F.2d 886. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, dated September 22, 1982, is reproduced in the supplement beginning at Appendix 1, Brief page A-1.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in the cause was entered on September 22, 1982. This petition of certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1), 62 Stat. 928.

STATEMENT OF THE CASE

Herman J. Doucet sued Diamond M Drilling Company and Chevron U.S.A., Inc., to recover damages for permanently disabling personal injuries he sustained while working as a crew pusher aboard the Diamond M Epoch, a submersible drilling barge owned and operated by Diamond M Drilling Company, which was engaged in oil and gas exploration in the Gulf of Mexico. Doucet sued Diamond M under §905(b) of the Longshoremen's and Harbor Worker's Act (L.H.W.C.A.)[1] and Chevron for negligence under the general maritime law.

1/ 33 U.S.C.A. §905(b), hereinafter called merely §905(b), allows a maritime worker to sue for injuries "caused by the negligence of a vessel."

After a three (3) day trial, the jury found Diamond M guilty of negligence and absolved Chevron. The jury awarded Doucet damages in the amount of $600,000, but found him to be 10% at fault, thus reducing the award to $540,000, less the amount of $65,213.64 claimed by the workmen's compensation intervenor, American Home Assurance Company for medical expenses and compensation previously paid to Doucet.[2]

At the close of the plaintiff's case, Diamond M's motion for a directed verdict was denied. Following the trial, the Trial Judge denied Diamond M's motions for directed verdict; or alternatively, for Judgment Non Obstante Verdicts, or for Remittitur or for a new trial.

Diamond M appealed. On August 23, 1982, the Court of Appeals reversed the jury's finding of negligence and the trial judge's failure to grant Diamond M a directed verdict, holding that a reasonable jury could not have found substantial evidence that Diamond M was negligent. Plaintiff's petition for rehearing and suggestion for rehearing en banc were denied on September 22, 1982.

FACTS

A. ***Roles of the Parties***:

2/ Thus all parties to the proceeding below were: (1) Herman J. Doucet (plaintiff); (2) Diamond M Drilling Company (defendant); (3) Chevron U.S.A., Inc. (defendant); and (4) American Home Assurance Company (intervenor). Chevron was not a party to any appeal.

Chevron contracted with Diamond M to drill oil and gas wells in the Gulf of Mexico, off the Louisiana coast. Diamond M contracted to provide a submersible drilling barge, the "Epoch", two drilling crews and roustabout crews. Chevron contracted with Doucet's employer, Offshore Casing Crews, Inc., to install or "run" casing on board the Epoch. "Casing" is steel pipe placed in an oil or gas well as drilling progresses to prevent the wall of the hole from caving in during drilling and to provide a means of extracting petroleum if the well is productive. Running casing is normally done by casing company employees with the cooperation of drilling company employees. The casing itself *was supplied by the owner* of the Offshore oil well, Chevron.

The driller is Diamond M's employee directly in charge of the drilling rig and crew. His main duty is operation of the drilling and hoisting machinery. From his position at a control console on the drilling rig floor, he manipulates the levers, switches, and brakes that control the machinery which raises and lowers pipes. His primary role in assisting the casing operation is to raise or lower the casing pipe to a proper working height. From his control panel the driller has a full view of all casing being raised from the pipe racks to the drill floor.

On April 21, 1977, Doucet, together with four other members of an Offshore Casing crew, Dale Briscoe, Glen Bourgeois, Terry Meche and Emory Richard, boarded the Epoch to run 4,000 feet of thirteen and three-eights (13 3/8") inch diameter casing. Chevron also ordered *five thirteen and three-eights inch clamp-on rubber protectors* to cover the threads on the male end of the casing so that

the threads would not be damaged while the casing was being moved about on the drilling barge.

The use of rubber protectors or "quickie" protectors in a casing operation is a simple process. The roustabouts remove a metal thread protector from the casing while the joint of casing is laying horizontally on the pipe rack, located one deck below the drill floor. Then the roustabouts replace the metal protector with a rubber protector and send the joint of casing up to the drill floor to the casing crew to be run into the well hole. On the drill floor, a casing crew member simply pulls on a latch on the rubber protector which easily releases the protector from the joint of casing. Then the casing crew sends the rubber protector back down to the pipe rack on a cable trolley line, so that it may be used on another joint of casing.

B. ***What the Roustabouts Failed to Do***:

It was the duty of the Diamond M roustabouts to remove the metal protectors from the casing while it was on the pipe rack and to replace the metal protectors with rubber protectors. All the evidence at trial showed that the Diamond M roustabouts failed to remove a cross-threaded protector from one joint of casing and simply sent it up to the drill floor for Doucet and his crew to remove it. As stated by the Court of Appeals in its opinion, "We think the jury could reasonably infer from the evidence that the roustabouts found it either difficult or impossible to remove the metal protector, so they simply sent it to the drilling floor where the casing crew would have to deal with it . . ." 683 F.2d at 890.

Therefore, Doucet had to stop running casing and attempt to remove a cross-threaded protector from the threads of a

2,000 pound joint of casing (which was 40 feet long and 13 3/8 inches in diameter) while the pipe was swinging suspended from a cable hung from the top of the derrick of the Epoch. Doucet had to wrestle with the free-swinging casing because the Diamond M roustabouts had breached their admitted duty to remove the metal protector and replace it with an easily removable rubber protector while the casing was lying inert on the pipe rack - a much less hazardous operation than manhandling a one ton swinging object. On the pipe racks, several roustabouts could have combined efforts to remove the cross-threaded protector or a welder could have cut it off.

C. ***What the Driller Failed to Do***:

When the joint of casing came up to the rig floor with the metal protector still in place, Doucet noticed one of his crew members having difficulty removing the metal protector by hand. Doucet got a 36 inch stillson wrench to remove the metal protector. Doucet saw that the joint of casing was too low to allow him to use the wrench while in a standing position. Thus Doucet asked the Diamond M driller, who was ten feet away and looking straight at Doucet, to pick up on the pipe. Doucet said his request was ignored and that he had to bend over awkwardly to jerk on the protector while it was only two or three feet off the floor, thereby rupturing a disk in his back.

Emory Richard, a member of the casing crew, testified that he heard Doucet ask the driller to raise the joint of casing and that the Diamond M driller ignored the request. Richard said Doucet was approximately seven (7) or eight (8) feet from the driller when the request was made. The

driller was four (4) or five (5) feet from Richard. *Richard testified that the driller should have heard Doucet's request and that the driller had failed to respond.*

Billy Buchans, the Diamond M driller, professed to remember nothing about the incident. Both Buchans and Joe Hawkes, Diamond M's safety supervisor and a former driller, testified that in a casing operation, the driller is watching the pipe and must stop it at a proper height so the person working on the casing will not have to bend over too far to remove the thread protectors.

Paul Montgomery, a petroleum engineer, testified that when rubber protectors are available, the preferred operational procedure is to remove the metal protector on the pipe rack because more time and more people are then available to deal with a problem protector than on the drill floor.

Mr. Robert Owen, a safety engineer, testified that the preferred method of applying force upon a wrench would be downward and, therefore, it would have been safer to remove the protector from a cylindrical object, such as the casing, while the object was laying horizontally on the pipe rack, rather than while the object was suspended from a cable. Mr. Owen also said that it was safer to pull upon the wrench from chest level, in a standing position, rather than from a bent position.

The Court of Appeals held that although the Diamond M roustabouts had sent the casing up to the drill floor where the casing crew would have to deal with the cross-threaded protector while the casing was hanging from a cable, Doucet had not been exposed to an unreasonable

hazard of personal injury. The Court of Appeals did not comment on the roustabouts' failure to leave the bad joint on the pipe racks or on their failure to warn Doucet that a bad joint was coming.

Additionally, the Court of Appeals held that the evidence was insufficient to find the Diamond M driller negligent because although the jury could reasonably have believed that Doucet had requested that Buchans raise the pipe, there was no evidence showing that Buchans had heard Doucet's request. Of course, the record is utterly devoid of any evidence that Buchans did not hear the request! Buchans himself did not say he did not hear but only that he did not remember the incident at all. Nor did the Court specify how one might go about proving that someone heard something other than introducing proof that someone else standing in the same place (Richard) heard it! Finally, the Court of Appeals failed to comment on how it absolved the driller from negligence in failing to properly position the casing, which was the sole *raison d'etre* for his presence on the drill floor.

JURISDICTION OF THE COURT BELOW

Jurisdiction of this action is grounded upon 43 U.S.C. §1333, the Outer Continental Shelf Lands Act, which extends jurisdiction to accidents occuring on the Outer Continental Shelf involving maritime workers covered by 33 U.S.C. §905(b), and upon 28 U.S.C. §1391(a), which establishes the diversity jurisdiction of the federal courts.

REASONS FOR GRANTING CERTIORARI

I.

THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, WHEN IT APPLIED ITS OWN STANDARD OF JURY VERDICT REVIEW FOR NON-MARITIME CASES ARISING UNDER THE COMMON LAW AND STATE STATUTES TO A JURY VERDICT IN A NEGLIGENCE ACTION CREATED BY FEDERAL MARITIME STATUTE [33 U.S.C. §905(b)].

The Court of Appeals reversed the jury verdict for Herman Doucet by finding that "reasonable jurors [could not] differ over whether substantial evidence supported an inference," 683 F.2d at 894, that Diamond M was negligent, and that the Trial Court mistakenly denied defendant's motion for a directed verdict. In so doing the court admittedly "analyzed and reanalyzed the record," 683 F.2d at 890, which might fairly be characterized as "weighing and reweighing" the evidence.

The Court of Appeals admitted that, "our task has not been made any easier by the fact that Diamond M was so confident of its position that it offered *no testimony* of its own." 683 F.2d at 890. Undaunted, the Court, on a key point, undertook to determine whether: "In this mass of *inconsistent*, sometimes contradictory, testimony, . . . could a reasonably minded jury have found by a preponderance of the evidence that the driller, Buchans, *heard*

and *ignored* the 'hollered' request to raise the pipe a little higher?" 683 F.2d 886. Implicit in the question is the premise that an affirmative answer would result in affirmance of the jury verdict.

The Court went on to say that: "The jury had a right to believe Doucet's testimony that he 'hollered' at Buchans to raise the pipe. He said Buchans was looking at him, but he took no action. *Buchans could have heard Doucet.* Did he, in fact, do so? A close examination of the record shows that on this issue the jury was left to rely on speculation and conjecture." 683 F.2d at 886.

Even if the jury had to speculate, *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916, 923 (1946), long ago stated: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute . . . a measure of speculation and conjecture is received on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.*"

Under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167, 101 S.Ct. 1614 (1981), 68 L.Ed.2d 1, the onus was not on Doucet to prove that *Buchans* heard the request but only that he "should have" heard it in the exercise of ordinary care. Both Buchans and Diamond M's safety supervisor, Hawkes, testified that the sole duty of Buchans at the time was to position the pipe properly for Doucet, whether or not he was asked to do so. Indeed, the Court of Appeals characterized Buchans as "Diamond

M's driller in charge of the pipe lift." 683 F.2d 892. Buchans did not deny hearing the request. He merely took the standard way out of testifying adversely to his current employer's interest by testifying that he "did not remember."

Emory Richard, who was "*five or six feet*" away from Buchans and Doucet testified positively that he heard Doucet's request. 683 F.2d 893.

Nonetheless, the Court of Appeals found "no substantial evidence" to support the jury verdict, reversed the jury and the trial court, citing as its authority the Fifth Circuit's own standard of review for motions for directed verdict or judgment n.o.v. formulated in *Boeing Company v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc). 683 F.2d at 889, instead of the *Lavender v. Kurn*, *supra*, line of Supreme Court cases which would not have permitted reversal of the *Doucet* verdict because there was obviously not an "absence of probative facts" to support the jury's verdict. This was egregious error. This Court has not previously defined the standard of review for jury verdicts in negligence actions under §905(b), an important question of federal law, which should be settled.

A. *Boeing Was Decided Prior to Passage of §905(b) and Announced A Rule Explicitly Tailored For Federal Cases Arising Under Common Law or State Law-Not For Negligence Cases Based on Federal Statute.*

Section 905(b) was added to the LHWCA in 1972. *Boeing* was a 1969 Fifth Circuit Decision which, *a fortiori*, could not have been rendered with application to §905(b) in mind.

Boeing involved an Alabama diversity personal injury suit arising under the common law and Alabama statute. The rule of review enunciated there was explicitly fashioned for "non-FELA federal cases *which are not based on statute.*" *Boeing, supra,* 411 F.2d at 373. *Doucet's* action arose under a federal statute, therefore, the *Boeing* rule should not have been applied to it. Instead, language in many decisions of this Court suggests that the standard of review for jury verdicts arising under §905(b) should restrict the Courts of Appeals from tampering with jury verdicts except in those cases where there are no probative facts to support the verdict - a standard under which the *Doucet* verdict could not have been reversed.

B. *Maritime Workers Are Entitled to a Maritime Standard of Jury Review Rather Than a Common Law Negligence Standard.*

1. *Casing Crew Workers Are Maritime Workers.*

The Fifth Circuit has held that specialty workers who are injured in the offshore oilfields are not seamen but are covered under the LHWCA because they satisfy both the situs and status tests for coverage under 33 U.S.C.A. §903(2). The *situs* test is met because the injury occurs on navigable waters of the United States, *Pippen v. Shell Oil Co.*, 661 F.2d 378, (5th Cir. 1981), and because the Outer Continental Shelf Lands Act (OCSLA) provides that "the term 'United States' when used in a geographical sense includes the Outer Continental Shelf and artificial islands and fixed structures thereon." 43 U.S.C.A. §1333(b)(3); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1348 (5th Cir. 1980). The status test is met because the specialty worker's job has a "significant relationship to traditional

maritime activity." *Pippen v. Shell Oil Co., supra,* 661 F.2d at 383; *P. C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 100 S. Ct. 328, 335, 62 L.Ed.2d 225 (1979).

Without protracted analysis the Fifth Circuit in *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981) assumed that a casing crew worker, such as Herman Doucet, was a maritime worker covered by §905(b). *Guidry* noted that the OCSLA, 43 U.S.C. §1333(b)(1) extended coverage of the LHWCA to injuries or death to employees resulting from exploration for natural resources on the Outer Continental Shelf.

2. *Once A Trial Court has Properly Instructed the Jury on the Standard of Negligence to be Applied in a §905(b) Case, the Jury's Verdict is Entitled to the Same Weight As a Jury's Verdict in the Other Two Species of Negligence Actions Created by Congress: The Jones Act and The FELA.*

Casing crew workers or other litigants under §905(b) are deemed to be maritime workers in order to bring their negligence suits under the aegis of a federal statute, rather than general maritime tort law. Thus they should be entitled to have jury verdicts rendered in their favor reviewed under a federal maritime statute appellate review standard not the *Boeing* standard of common law negligence appellate review. The Chief Judge of the Fifth Circuit recognized the correctness of this analysis in *Chiasson v. Rogers Terminal and Shipping Corp.*, 679 F.2d 410, 412 (5th Cir. 1982) where the Court affirmed a jury verdict for a longshoreman, observing:

> "The jury, having a chance to observe the demeanor of the witnesses and to test their credibility, concluded that Rogers was negligent. *The record provides support for the*

> *jury's finding*, which we are neither inclined nor permitted to disturb on appeal. *Sanford Bros. Boats Co. v. Vidrine*, 412 F.2d 958, 963 (5th Cir. 1968), *citing Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 76 S. Ct. 608, 100 L.Ed.2d 668 (1956)."

Both the *Vidrine* and *Schulz* cases are Jones Act cases. Thus, Judge Brown recognized in *Chiasson* the validity of Herman Doucet's contention. The standard of negligence *is* different in §905(b) cases and Jones Act cases (the *Scindia* standard of "reasonable care under the circumstances" for §905(b) versus "any negligence no matter how slight" for Jones Act and FELA). But once the jury has been properly instructed as to the standard of negligence in a §905(b) case, there is no logical reason why the jury's verdict should be accorded any less weight on appeal than a jury verdict in the other two species of negligence actions created by federal statute where a litigant may elect to try his case to a jury: the FELA and the Jones Act.

To bolster this argument we may consider these similarities:

(a) The FELA allows a railroad worker recovery for "injury or death resulting in whole or in part from the *negligence*" of railroads. 45 U.S.C. §51. Comparative negligence not contributory negligence applies. 45 U.S.C. §53.

(b) The Jones Act allows a seaman recovery for the *negligence* of his employer as defined in the FELA. 46 U.S.C. §688. Comparative negligence applies.

(c) Section 905(b) allows a maritime worker recovery for injury "caused by the negligence of a vessel." Comparative negligence applies. *Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256, 258, 61 L.Ed.2d 521, 526, 99 S. Ct. 2753 (1979).

C. *The Fifth Circuit is in Conflict.*

Diamond M has acknowledged that the Trial Judge correctly instructed the *Doucet* jury even though he did so prior to this Court's *Scindia* decision. Whether it was prescience or luck, the Trial Court instructed the jury that the proper standard of care in this case alleging operational negligence was one of "due care under the circumstances." Diamond M has not complained on appeal about jury instruction given to the jury. *Ergo*, we are entitled to assume the *Doucet* jury was properly instructed.

Judge Brown in *Chiasson* tacitly recognized that a properly instructed jury's verdict in a §905(b) case is entitled to equal dignity on appeal with a Jones Act verdict. In so doing he is in accord with decisions in other circuits. [3] Unfortunately, there appears to be a conflict on this matter both *within* the Fifth Circuit, as well as *between* the Fifth Circuit (other than Judge Brown in *Chiasson*) and other federal courts of appeals. A table of all *Pre-Scindia* and *Post-Scindia* decisions by the Fifth Circuit is appended to this application for ready reference. (Appendices 6 and 7).

There are two §905(b) cases in which the Fifth Circuit affirmed directed verdicts for defendants without stating what standard of review it was applying. [4] In the other six

---

3/ See, e. g., *Johnson v. Ats Ivarans Rederi*, 613 F.2d 334, 351 (1st Cir. 1980) relying on *Rios v. Empresa Lineas Martimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978) which cites *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479, 64 S. Ct. 232, 88 L.Ed.2d 239 (1943) which is an FELA case.

4/ *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977); *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981).

reported §905(b) cases emanating from the Fifth Circuit [5] where the standard of review for jury verdicts was at issue, the Circuit Court panels involved uniformly applied the common law/state negligence statute standard of *Boeing* to jury verdicts under a federal statute, thereby ignoring the limitations expressed by *Boeing* itself which only purports to fashion a rule for "federal cases which are not based on statute." *Boeing Company v. Shipman, supra*, 411 F.2d at 373. Thus, Judge Brown's analysis in *Chiasson* stands alone among nine reported cases as a correct statement of the proper standard of appellate review of jury verdicts in §905(b) cases.

Rule 17 of the United States Supreme Court says writs of certiorari are appropriate: "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;" or "(b) When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court. . . ." Thus review of the *Doucet* decision by this Court is in order.

D. The Same Policy Reasons Which Have Motivated This Court to Discourage Appellate Tampering With Jury Verdicts in Jones Act and FELA Cases Apply in This Case: Furtherance of Safety of Workers in a Dangerous Occupation and Protection of a Federal Statutory Policy Enshrined in Remedial Legislation.

5/ *Samuels v. Empresa Lineas Martimas Argentinas*, 573 F.2d 884, 885 (5th Cir. 1978); *Stockstill v. Gypsum Corp.*, 607 F.2d 1112, 1114 (5th Cir. 1979); *McCormack v. Noble Drilling Co. of California*, 608 F.2d 169 (5th Cir. 1979); *Hebron v. Union Oil Co. of California*, 634 F.2d 245, 247 (5th Cir. 1981); and *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886, 889 (5th Cir. 1982).

From 1943 to 1949, this Court granted writs in 20 FELA cases and in "16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury." *Wilkerson v. McCarthy*, 336 U.S. 53, 70, 69 S.Ct. 413, 93 L.Ed. 497, 509 (1949). This Court was sending the lower courts a clear message which it summarized as follows:

> "The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. . . . That purpose was not given a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act * * *. In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. * * * And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them."
>
> "[Since 1943, however,] * * * The historic role of the jury in performing that function * * * [of passing on disputed questions of fact] is being restored in this important class of cases." 336 U.S. at 68, 69.

In reversing the trial court's granting of a directed verdict for the defendant, the *Wilkerson* Court said: "[W]here jury trials are required, courts must submit the issues of negligence to a jury *if evidence might justify a finding either way on those issues*. . . . It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need only look to the evidence and reasonable inferences which tend to support the case of litigant against whom a peremptory instruction has been given." 336 U.S. at 55, 57.

Seven years later in *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 525-526, 76 S.Ct. 608, 100 L.Ed. 668, 671 (1956), (cited by Judge Brown in the *Chiasson* case as controlling in §905(b) cases) this Court made it clear that it was equally solicitous of the fact-finding prerogatives of the jury in Jones Act cases. Reversing the Second Circuit which had affirmed the district court's granting of a directed verdict for the employer of a tug crewman this Court said:

> "[I]t must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. *Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases.* '[W]e think these are questions for the jury to determine. . . . ."
>
> "Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Lest there be any doubt, the *Schulz* Court cited *Tennant v. Peoria & P.U.T. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed.

520, 525 (1944)[6], for the proposition that "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." 350 U.S. at 526, n. 9.

In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268, 97 S.Ct. 2348 (1977), 53 L.Ed.2d 320, 335, Justice Marshall spoke for a unanimous Court and reiterated the premise that the LHWCA, including the 1972 Amendments, is entitled to broad interpretation equivalent to the Jones Act when he said:

> "The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongrous results.' *Voris v. Eikel*, 346 U.S. 328, 333, 98 L.Ed. 5, 74 S.Ct. 88 (1953)."

The Congressional Committee Reports unequivocably advanced safety of the maritime worker as the *sine qua non* of the 1972 Amendments to LHWCA:

> "It is the Committee's view that every appropriate means be applied toward *improving the tragic and intolerable conditions which take such a heavy toll upon worker's lives and bodies in this industry*. . . . Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same

---

6/ Cited by Doucet in his application for rehearing to the Court of Appeals.

care as a land-based person in providing a safe place to work. *Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.*" H. R. Rep. No. 92-1141, 92nd Congress, 2d Session, 3 U.S. Code Cong. & Admin. News pp. 4699, 4702-95.

Diamond M's roustabouts and drillers could have easily prevented Herman Doucet's injury by performing their operational duties. Yet the Court of Appeals totally absolved Diamond M of responsibility.

Such decisions only encourage the offshore oil drilling companies to maintain their abysmal safety record. The mortality rate for oil drilling workers in Louisiana's onshore and offshore oilfields for the years 1973-1979 was 188-283/100,000 workers per year. This compares to a mortality rate of 14/100,000 for all U.S. workers and 57/100,000 for a high-risk industry such as construction.[7] Thus, working offshore is much more hazardous than building skyscrapers or mining coal! It will not get safer if appellate courts are allowed "willy nilly" to reverse jury verdicts for injured offshore oil workers.

There are only two federal statutes which allow maritime workers recovery for negligence: the Jones Act and §905 (b). The dangers encountered by offshore oilfield workers in the Gulf of Mexico are no different whether the fortuitous circumstances of their employment result in their designation as "seamen" or "maritime workers" under OCSLA and §905 (b). Gilmore and Black, The Law of Admiralty (2nd Ed.), p. 454, authoritatively suggests: "The longshoremen. . . are on the ship in furtherance of the shipowner's commercial

---

7/ Morbidity and Mortality Weekly Report, Center for Disease Control, Atlanta, Ga.; May 23, 1980, Vol. 29, No. 201.

interests. They are . . . doing the ship's work - arguably, work that at one time was performed by the crew they are unquestionably subject to the ship's hazards." This Court should declare that jury verdict review standards for §905 (b) workers and seamen are the same, *ergo, Doucet's* jury verdict must stand.

II.

EVEN UNDER COMMON LAW STANDARDS OF APPELLATE REVIEW OF JURY VERDICTS THE COURT OF APPEAL IMPROPERLY SUBSTITUTED ITS OWN OPINION ON FACTS FOR THE OPINION OF THE JURY.

The Seventh Amendment to the United States Constitution says: "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Some eminent commentators profess to find a great distinction between the common law rules of appellate jury verdict review and the Jones Act and FELA rules. United States Supreme Court cases antedating the FELA suggest that the difference is more apparent than real.

Thus, in *Kane v. Northern Cent. R. Co.*, 128 U.S. 91, 32 L.Ed. 339, (1888), Mr. Justice Harlan, speaking for the Court, reversed a directed verdict for the defendant railroad on the question of contributory negligence, saying that the plaintiff was to be accorded "the benefit of every [fair] inference" from the evidence - which rule would certainly allow the Doucet jury to infer that the driller could hear Doucet's request to raise the pipe or that the driller's failure to do what he was on the rig to do (raise the casing to its proper position) was a cause of Doucet's injury.

Likewise, in the post-FELA common law case of *Gunning v. Cooley*, 281 U.S. 90, 84, 74 L.Ed. 720, 724 (1930), a

claim for medical negligence, this Court affirmed a jury verdict for the plaintiff in these words: "Where uncertainty as to the existence of negligence arises from a conflict in the testimony, the question is not one of law but of fact to be settled by the jury . . ." In *Doucet* the Court of Appeals bemoaned "this mass of inconsistent, sometimes contradictory, testimony," then presumed the power to resolve the contradictions contrary to the jury - a result flatly prohibited by *Gunning* which leaves resolution of conflicts to the jury.

In exceeding its appellate power, the Court of Appeals had recourse to a time-honored technique - it sought out isolated bits of testimony in a three day trial that supported its contention that plaintiff's testimony was inconsistent and totally ignored testimony which supported plaintiff's claim. For instance, the Court ignored Paul Montgomery's testimony that the roustabouts took the metal protectors off on the pipe rack to "possibly eliminate a problem that you might have later on while you are actually running the casing," (Tr. 327), and "just to facilitate removing it once you get it onto the floor" (Tr. 333), showing their purpose was to eliminate the very type of problem that caused Doucet's injury. When asked whether the work situation to loosen the cross-threaded protector would be better on the pipe racks than on the drilling floor, Mr. Montgomery responded "*on the pipe rack because you are in a position of having more people to work on that specific job and generally more time if you have trouble with a specific thread protector.*" (Tr. 333). Thus the Court of Appeals' conclusion that Montgomery made only a single statement showing that the roustabouts' failure to remove the protector was negligent is both inaccurate and unfair.

Robert Owen, a safety expert, testified that *the preferred method of applying force upon a wrench would be downward and that, therefore, it would have been safer to remove*

the protector from a cylindrical object, such as the joint of casing, while the object was laying horizontally on the pipe rack, rather than having to do so while the object was suspended from a cable (Tr. 317-18), and that he had recommended use of the rubber protectors to two casing companies because they would "eliminate the problems they have with removing protectors." (Tr. 309). Despite its obvious probative weight on the question of negligence, the Court of Appeals did not acknowledge Mr. Owen's testimony in its opinion. Future Legal Scholars who read *Doucet* will not know Owen testified at the trial. But the jury did! And so did the trial judge. By arbitrarily failing to acknowledge a key witness' testimony on a decisive issue the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17, Supreme Court Rules.

The Court of Appeals weighed the testimony of one *witness*, Paul Montgomery, and labeled his testimony as "self-contradictory". 683 F.2d 892. But under common law rules, is it not the function of the jury to weigh conflicting testimony? In essence, if there are no conflicts, no jury question is created.

The Court of Appeals ignored the driller's admission that it was his job to pull up on the joint of casing so as to "*stop it here so that the men won't have to . . . bend over.*" (Tr. 83). Diamond M's safety supervisor, Hawkes, explained further: ". . . *in a lot of incidences he* (casing crewman) *would not even have to signal because he* (driller) *could see it* was already tied onto and he will go ahead many times and clutch the rig and pick the joint pipe up . . ." (Tr. 20). When the driller was asked whether he "would be looking at him [casing crewman] as it [the casing] was being guided in to be

sure that you stopped it at about the right height", Buchans' unequivocal response was "Yes, sir." (Tr. 82-83).

The Court of Appeals stated that the jury was entitled to conclude that Doucet asked the driller to pick up the pipe. Unaccountably, the Court of Appeals then absolved Diamond M of negligence, by finding that the driller *had not heard the request*. Once Diamond M's driller and its safety supervisor admitted that the driller had the duty to move the casing to a safe working position, was the jury not free to hold the driller negligent for his failure to so do - whether or not a request was made? Has the Court of Appeals not reweighed the evidence and inferences and reached its own conclusion in holding that the driller had not heard Doucet's request? Was it not as reasonable for the jury to have concluded that the driller heard Doucet or more importantly, *that he should have heard his request*?

Even under common law rules for jury verdict review under the Seventh Amendment the Court of Appeals departed so far from the norms of judicial process that this Court should grant a writ of certiorari to petitioner.

III.

THE COURT OF APPEALS REQUIRED HERMAN DOUCET TO ASSUME THE RISK OF INJURY CREATED BY THE FAILURE OF DEFENDANT'S ROUSTABOUTS AND DRILLER TO PERFORM THEIR ASSIGNED TASKS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

"Assumption of risk" is not a defense to a §905(b) negligence suit. *Scindia Steam Navigation Co. v. De Los Santos*,

supra, 451 U.S. at 165-166 n. 13. While the Fifth Circuit has rendered ritualistic homage to this principle, even a cursory examination of its decisions reveals that since the enactment of §905(b) the Fifth Circuit has routinely applied a type of assumption of the risk to bar recovery by injured maritime workers.

For example, in *Hill v. Texaco, Inc.*, 674 F.2d 447, 452 (5th Cir. 1982) the Fifth Circuit reversed a judge's award of damages to a maritime worker who slipped and fell from a slippery and rusty ship tank by holding: "The tank, although wet, posed ONLY A LIMITED AND ACCEPTED HAZARD TO Hill" because he knew it was wet.

The Fifth Circuit said it did not matter if the drilling company roustabouts sent casing with a cross-threaded protector up to the floor to set the stage for Doucet's injury, or if the driller failed to lift the casing to a proper working position making Doucet's back injury more likely. Most revealingly, the Court of Appeals in Doucet said: "The pipe did not fall on him or strike him. He HURT HIMSELF while attempting to remove the metal protector." 683 F.2d at 890. Thus, the Court of Appeals presumed that the mere failure of the shipowner's employees to perform their duty was inconsequential. Apparently, the Court believed it was necessary for Doucet to show an active type of negligence (e.g., that Diamond M's employees hit him with the pipe) verging on gross negligence in order to recover. Mere failure to perform by the shipowner's employees is effectively deemed to create "only a limited and accepted hazard" to Doucet (see *Hill v. Texaco*, *supra*, 674 F.2d at 452), so long as Doucet could appreciate the risk of injury created thereby.

We submit that there are no "acceptable" observable hazards under §905(b) if they are created by the shipowner's

negligence. Writs should be granted to insure adherence to applicable decisions of this Court barring assumption of the risk as a defense to a §905(b) action.

IV.

IN REVERSING THE JURY AWARD OF $540,000 TO PETITIONER, THE COURT OF APPEALS CONTINUED TO IMPLEMENT ITS OWN OVERLY RESTRICTIVE STANDARD OF SHIPOWNER NEGLIGENCE INSTEAD OF THIS COURT'S DECISION IN *SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS.*

The Fifth Circuit's decision in *Doucet* embodies a narrowly restrictive interpretation of "negligence" under §905(b). The Fifth Circuit has over-reacted to the 1972 Amendments to LHWCA which were designed to affect a simple trade: maritime workers got increased compensation benefits but lost the right to sue the shipowner for unseaworthiness. After passage of the 1972 Amendments and before this Court's decision in *Scindia*, the Fifth Circuit denied recovery to §905(b) plaintiffs in 78.6% of its decisions which finally adjudicated the rights of the litigants. Appendix 8, p. A-58. By and large, the Fifth Circuit adopted restrictive definitions of "negligence" which imposed assumption of the risk upon the plaintiff and allowed the defendant to escape liability under §905(b) unless it was guilty of a type of gross negligence. Mere violation of ordinary prudence was not deemed sufficient to constitute "negligence". *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1238 (5th Cir. 1977) applied to §905(b) the archaic rules of Restatement (Second) of Torts, Sections 342, 343 and 343-A, which delineate the duties of a possessor of land to licensees. Under this approach the shipowner was liable for injuries to maritime

workers caused by dangerous conditions aboard the vessel only if the danger were such that the shipowner should expect the worker "invitees" "will not discover or realize the danger, or will fail to protect themselves against it."

Happily, in 1981 this Court re-established the legislative intent of §905(b) in *Scindia Steam Navigation Co. v. De Los Santos, supra. Scindia* held that: The shipowner "has a duty with respect to the *condition* of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and *if he fails at least to warn the stevedore* of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman." 451 U.S. at 167.

Scindia clearly envisions that "contract provisions" or custom can define the shipowner's duties under §905(b). *Scindia Steam Navigation Co. v. De Los Santos, supra*, 451 U.S. at 172, 176 n. 23. Diamond M's contract with Chevron is part of the record in *Doucet*. The contract specifies that Diamond M is to provide roustabout services and a driller to run the drilling rig. All parties to *Doucet* admitted that both the contract and custom of the drilling trade imposed upon the roustabouts a duty to install the rubber protectors on the pipe rack and upon the driller a duty to lift the pipe to a safe working condition. Neither the roustabouts nor the driller performed their duties. Yet the Court of Appeals did not so much as mention the existence of a contract in its opinion, and airily dismissed custom as "relevant but not conclusive as to a defendant's negligence." 683 F.2d at 892. In failing to find plaintiff's proof of Diamond M's violation of its contractual and customary duties sufficient evidence of negligence, the Court of Appeals patently violated *Scindia*, thereby deciding "a federal question in a way

in conflict with" an applicable decision of this Court and justifying review of this case on certiorari. Supreme Court Rule 17.

Scindia assumed *a priori* "that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care *to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel* during the stevedoring operation." 451 U.S. at 167. Presumably, the same reasoning would apply to hold oil drilling vessel owners liable for failure "to avoid exposing" casing crew workers "to harm from hazards" they encounter on drilling rigs under the active control of the vessel during the casing operation. In *Doucet*, the Court of Appeals admitted that *Scindia* provided the proper standard, 683 F.2d at 890, but then aborted the jury's proper application of the due care standard, finding that the vessel was not responsible for the hazards which injured *Doucet*. The unspoken premise of this decision was: the risks of trying to remove the protector with the wrench were apparent to *Doucet*, so the ship's employees were absolved from the responsibility of having created the risks. This re-introduces assumption of risk in flat violation of *Scindia's* prohibition against that doctrine.

Of eight *post-Scindia* cases where the Fifth Circuit decision finally determined the maritime workers' §905(b) rights, only two have been won by the maritime worker. Appendix 8, p. A-58. Thus the shipowner has been winning 75% of the *post-Scindia* final decisions as compared to 78.6% *ante-Scindia*.

Apparently, it is *still* the Fifth Circuit's view that a shipowner cannot be held liable under §905(b) for ordinary negligence, in the sense of *failing to do* what an ordinary prudent

man would do. One may hazard a guess that if Diamond M had done something as dramatic as dropping the casing on *Doucet*, he might have recovered. The Court of Appeals language suggests this when it said "the pipe did not fall on him or strike him." Such drastic active negligence is not required by §905(b).

One is led to the inescapable conclusion that the Fifth Circuit is still applying the same restrictive interpretation of §905(b) negligence now as it did before *Scindia*. Conclusive proof of this is the statement by Judge Politz for the Court in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243,1247, (5th Cir. 1982): "WE CONCLUDE THAT *SCINDIA* DID NOT CHANGE THE LAW IN THIS CIRCUIT AS RELATED TO THE SITUATION PRESENTED BY *PLUYER*." (i.e., a defective ship's ladder). Judge Politz was one of the three judges who decided *Doucet*.

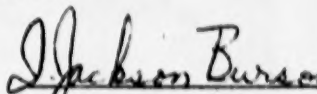
CONCLUSION

This Court should grant certiorari in *Doucet* to decide the important unsettled question of the proper standard of jury verdict review under §905(b). Finally, like the sole parade watcher who noticed that the Emperor's new clothes were really no clothes at all, we are constrained to note that the Court of Appeals opinion was no more than a re-examination of facts tried by the jury regardless of the semantic camaflouge in which it is disguised. As the final guardian of the integrity of the Seventh Amendment, as of all our Constitution, only this Court can right the wrong done to Herman Doucet.

For all these reasons, petitioner respectfully prays that his Petition for Writs of Certiorari be granted and that after

consideration by this Honorable Court that the jury verdict in favor of Herman Doucet be reinstated.

December 16, 1982.

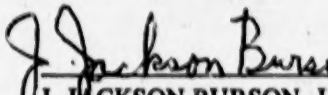


I. JACKSON BURSON, JR.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been forwarded to all attorneys of record by depositing the same in the United States Mails, postage prepaid and properly addressed to the said attorneys.

Eunice, Louisiana, this 16 day of December, 1982.



I. JACKSON BURSON, JR.
YOUNG & BURSON
Counsel for Petitioner